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IN THE
Supreme Court of the United States
October Term 1975

No. 75-1801

THE STATE OF NORTH CAROLINA,
Petitioner,

v.

CHAS. PFIZER & CO., INC., AMERICAN CYANAMID COMPANY, BRISTOL-MYERS COMPANY, OLIN MATHIESON CHEMICAL CORPORATION and THE UPJOHN COMPANY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Introduction

This is a case involving "material issues of great public importance". *American Cyanamid Company v. FTC,* 363 F.2d 757, 779 (1966). In prior actions between Respondents themselves, FTC proceedings, coordinated multidistrict pretrial proceedings, two U.S. Government criminal prosecutions which reached this Court in 1972, an on-going U.S. Government civil action (in continuous trial since December 1974),* as well as the present action by the State of North Carolina, all spanning nearly 22 years of constant litigation, this case has been extensively dis-

*The Court of Appeals for the Eighth Circuit has just recently held foreign governments have standing to sue these Respondents for substantially the same violations as were at issue in this trial, thus more years of litigation are forthcoming. *(Pfizer v. Lord,* 522 F.2d 612, (8th Cir. 1975).

cussed in literally hundreds of pages of opinions in the Sixth, Eighth, Second and (now conflicting) Fourth Circuits. Involved in the present litigation are major questions of antitrust law and policy regarding patent fraud, private settlement of a patent office interference, mutual assistance in a second patent office interference between two of the parties to eject a third competitor, patent interchange agreements, offensive assertion of collateral estoppel, conspiracy, price fixing, monopolization, exchange of price information and exceptionally high margins of profit with stable and identical prices.

At stake for North Carolina as a state, its hospitals, and virtually every adult consumer of the broad spectrum antibiotics in suit are many millions of dollars in damages.

Notwithstanding the obvious weight and complexity of this case, Petitioner has made every effort, in this petition, to maintain a balance between the requirements for clarity on the one hand and the necessity of brevity on the other. Petitioner prays this Court's indulgence that neither the comparative length nor converse constrained brevity of its petition will prejudice the thoughtful consideration by this Court of its Petition for a Writ of Certiorari.

I. OPINIONS BELOW

The Opinion of the Fourth Circuit in this case is unreported. The Slip Opinion is submitted in Appendix "A".* The order of the District Court (E.D.N.C.) denying estoppel is unreported and is submitted in Appendix "B". The order denying Section 5(a) Clayton Act to FTC adjudication is reported *In re Coor-*

*The final decision of the Court of Appeals for the Sixth Circuit, with which the Fourth Circuit is now in clear and direct conflict, is *Chas. Pfizer & Co. v. Federal Trade Commission*, 401 F.2d 574 (6th Cir. 1968), *cert. den.* 394 U.S. 920 (1968).

dinated Pretrial Proceedings in Antibiotics Antitrust Actions SDNY, 1971).* The order *affmg. prima facie* case of violations is reported at 456 F.2d 545 (8th Cir. 1972) and is submitted in Appendix "B". Appendix C is the District Court's (E.D.N.C.) decision 384 F. Supp. 265).

II. JURISDICTIONAL GROUNDS

Petitioner, invoking the jurisdiction of this Court, shows: (a) the judgment of the Fourth Circuit in this case was entered on January 12, 1976 (App. A, p. A-1); (b) an Order granting extension of time to petition for rehearing was entered on January 27, 1976 (App. A, p. A-29); (c) an Order denying rehearing was entered on March 15, 1976 (App. A, p. A-31); and (d) an Order staying issuance of the mandate pending timely petition for writ of certiorari (June 14, 1976) was entered on March 18, 1976 (App. A, p. A-32).

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

III. QUESTIONS PRESENTED FOR REVIEW

A. The Clear and Direct Conflict Between the Circuits Question.

The Sixth Circuit, in an opinion dealing with the very same issue (Pfizer's and Cyanamid's fraud on the Patent Office) and the very same evidence of record in the present case, held:

> . . . The Patent Office records** were sufficient to put both Pfizer's and Cyanamid's representatives on notice that Lidoff (the Patent Office Examiner) was interested in

*1971 Trade Cases para. 73, 652. p. 90719.

**_Cyanamid v. F.T.C._, 363 F.2d 757, 775, n. 12, (6th Cir. 1966) sets forth the Patent Office's language rejecting Pfizer's, Cyanamid's and Bristol's broad product claims to the chemical compound—tetracycline. The rejection is stated herein at p. 18-19 *infra.*, together with some of the evidence of Respondents' knowledge of the issue in the Patent Office.

ascertaining whether any tetracycline was inherently produced in aureomycin broths, and not ten precent or other "appreciable" or "recoverable" amounts as now contended . . . (and) . . . it was the obligation of both Pfizer and Cyanamid to make a full disclosure, even though they understood Lidoff to be interested only in 'appreciable' or 'recoverable' percentages. *Chas. Pfizer & Co. v. F.T.C.*, 401 F.2d 574, 585 (6th Cir. 1968), *cert. den.*, 394 U.S. 920 (1968).

The Sixth Circuit then affirmed the findings of fraud by the FTC which had been made on "clear and convincing" evidence, stating:

On the record before us, we could conclude that the FTC's findings . . . on the part of both Pfizer and Cyanamid are supported by *clear, unequivocal and convincing evidence.* (emphasis added) (401 F.2d. 585).

Consistently, the Eighth Circuit, in the instant litigation during multidistrict coordinated pretrial proceedings*, held:

Certainly the final decision of the Court of Appeals for the Sixth Circuit is adequate to form a sound basis for the finding of a *prima facie* case of fraud. *Pfizer v. Lord*, 456 F.2d 545, 551 (8th Cir. 1972).

However, the Court below placed its decision in direct conflict with the final decisions above in affirming the District Court's (E.D.N.C.) determina-

*This action was commenced January 31, 1969 in the Eastern District of North Carolina and was transferred by the Judicial Panel on Multidistrict Litigation to the Southern District of New York for coordinated pretrial pursuant to 28 U.S.C. Sec. 1407. It was subsequently transferred by the transferee judge to the District of Minnesota for all purposes pursuant to 28 U.S.C. Sec. 1404. Upon motion by Petitioner, pursuant to 28 U.S.C. Sec. 1404, it was returned to the Eastern District of North Carolina for trial.

tion that even though "... these gentlemen did not tell Lidoff any more than was absolutely necessary to satisfy him" that his speculation of inherent coproduction was wrong (when, in fact, it was correct):

". . . the evidence, *regardless of how the words* used by the parties *are to be interpreted*, falls short of establishing fraud . . ." (emphasis added).

* * * * *

"at best, the evidence has left the Court with the impression that there was a mutual misunderstanding between Lidoff and Pfizer's representatives as to what Lidoff wanted established . . . the evidence in this case (identical to that in the FTC and before the Sixth and Eighth Circuits) is far from 'clear, unequivocal and convincing' that Pfizer's representatives failed to fulfill their 'uncompromising duty' ". (384 F. Supp. 265, 281, n.26, App. C, p. C-409a).

THE QUESTION IS: SHOULD THIS COURT ISSUE A WRIT OF CERTIORARI TO THE FOURTH CIRCUIT TO RESOLVE THIS CLEAR AND DIRECT CONFLICT BETWEEN THE CIRCUITS ON A LEGAL INTERPRETATION OF U.S. PATENT OFFICE RECORDS WHICH ARE DETERMINATIVE OF THE SAME ISSUE OF FRAUD?

B. The Collateral Estoppel Question.

On September 29, 1967 the Federal Trade Commission (a "fact finding body"), upon "clear, convincing and substantial"* evidence, adjudicated the fact that both Pfizer and Cyanamid had:

*As observed in 9 *Wigmore on Evidence*, at 329 (Reiser, Supp. 1972) the pertinent test is "clear and convincing" although the courts have varied slightly as to the exact wording.

> . . . made misrepresentations to the Patent Office and withheld essential information, thereby deceiving Lidoff (the Patent Examiner) into granting a patent which otherwise never would have been approved. *(In re: American Cyanamid, et. al.,* 72 F.T.C. 623, 627, 633 (1967).

and upon "clear and convincing" evidence that Pfizer had:

> . . . kept (the Patent Office) in the dark by deliberate withholding on the part of some employee or employees . . . material information was suppressed by Pfizer . . . (*id.*, 684)

and, as an alternative ground, that

> . . . the evidence is clear and convincing that Pfizer committed fraud upon the Patent Office in procuring its patent (on tetracycline) (*id.*, 684-685)

and that as to Cyanamid,

> In sum, the evidence is clear and convincing that Cyanamid deliberately withheld from the Patent Office information which it knew or had reason to believe was relevant to the validity of Pfizer's application for a patent on tetracycline (*id.*, 688).

On appeal to the United States Court of Appeals for the Sixth Circuit a second time, that Court stated:

> The basic question is whether Pfizer and Cyanamid made misrepresentations to Lidoff and withheld essential information from him, thereby deceiving him into granting a patent on tetracycline which otherwise would never have been approved.
>
> * * * *
>
> Much of the previous uncertainty in the record is eliminated by the testimony of H.J. Lidoff . . .
>
> * * * *

> The issue now before this Court is whether the findings of the Commission are supported by substantial evidence. *(Pfizer,* (401 F.2d 574, 578, (6th Cir. 1968).

rejecting Pfizer's contention that the proper yardstick for *appellate review* of findings of fraud is "clear, unequivocal and convincing" evidence.

THE QUESTION IS: WAS PETITIONER ENTITLED TO ESTOP RELITIGATION BY PFIZER AND CYANAMID OF THE IDENTICAL FACTS INVOLVING THEIR FRAUD ON THE U.S. PATENT OFFICE, WHICH WERE PREVIOUSLY FAIRLY AND FINALLY ADJUDICATED UPON "CLEAR AND CONVINCING" EVIDENCE BY THE UNITED STATES GOVERNMENT'S AGENCY, ACTING AS A FACT FINDING BODY, AND AFFIRMED ON APPEAL BY THE UNITED STATES COURT OF APPEALS WHOSE DECISION IS FINAL?

C. The Question of *Mens Rea* as an Element of Fraud on the Patent Office in the Context of *Walker Process.**

In 1953 and 1954, while prosecuting their respective broad product claims on the chemical compound tetracycline (involved in two separate Patent Office Interferences), both Pfizer and Cyanamid denied as a fact that any tetracycline had ever been produced in aureomycin manufacture. The fact was that tetracycline was always coproduced with aureomycin since 1948 in amounts varying from 2% to 20%. This fact was known or readily ascertainable by both Pfizer's and Cyanamid's personnel directly involved in the prose-

**Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965).

cution of their respective patent applications. The Patent Office rejected both patent applications on its speculation that tetracycline had been produced in aureomycin manufactured under the Duggar and Niedercorn processes cited as the prior art.

The records of the Patent Office were sufficient to place Pfizer's and Cyanamid's officials on notice to make a full disclosure in accordance with their uncompromising duty. *(supra.*, p. 3-4).

All of the foregoing elements of fraud, including *scienter,* were thus clearly and unequivocally established in the trial of this case.

However, the District Court required proof of an additional element, that of *mens rea.*

THE QUESTION IS: DO THE TERMS "KNOWING" AND "WILLFUL" USED IN *WALKER PROCESS* RELATE TO PROOF OF A *MENS REA* (i.e., A SPECIFIC INTENT TO DEFRAUD) AS A SEPARATE ELEMENT, OR DO THEY RELATE TO PROOF OF *SCIENTER* AS IN A TORT IN A CIVIL ACTION?

D. The Question of the Court's Refusal to Require Determination of the Purposes, Operating Practices and Effects Thereof on Prices in a Patent Interchange Agreement—Antitrust Case.

Where competitors Pfizer and Cyanamid in 1953, possessing over 92% of the broad spectrum antibiotic (BSA) market through patent ownership, made express agreements: to privately settle any future Patent Office interference (not then declared) between their broad tetracycline product claims, including a license by the winner to the loser; a patent interchange between complementary patents; to grant a license to Pfizer under existing Cyanamid patents; for Cyanamid to assist Pfizer to gain early entry into the

tetracycline market through furnishing Pfizer tetracycline in bulk; and for Cyanamid to give highly valued and closely guarded secret know-how to Pfizer because Pfizer did not know how to make aureomycin even using Cyanamid's patent teachings as a guide; and where Cyanamid later assists Pfizer in obtaining "early issuance of a patent" on the new competing product—tetracycline; and

Where Cyanamid had, just prior to its agreements with Pfizer, acquired a potential competing company's patent application to tetracycline as well as its entire antiobiotic production capacity, including tetracycline; and

Where both refused for 13 years to license competitors or to sell it in bulk to anyone on any terms (except to Bristol to manufacture and sell and Pfizer licensed Squibb and Upjohn to sell, after actions *inter sese* which developed the essential facts presented in the FTC and instant actions); and

Where Pfizer and Cyanamid cooperate in the Patent Office during a second interference to eject a competing tetracycline patent applicant (Bristol) from the interference and both deny the existence of a fact, which both companies knew, or should have known, to be a fact, thereby causing the patent to issue; and

Where Cyanamid's patent attorney was to later testify that

> "With no patent on tetracycline, any Tom, Dick and Harry with a little bit of money could get in the business . . . (Tr. 2756)*; and

Where there were continued written and oral expressions in the presence of each other, or in public announcements, regarding their concern that a penicillin situation** be avoided in the broad spectrum market; and

---

*"Tr." refers to transcript of trial.

***A penicillin situation was understood by those in the industry to mean excessive production, intense price competition (price "wars), and low and uncertain margins of profit.*

Where Bristol, Squibb and Upjohn entered the tetracycline market through a deal between them that Bristol was to supply the tetracycline requirements of Squibb and Upjohn prior to issuance of patent on tetracycline, had discussions between them to the effect no valid patent could issue on tetracycline because of its prior inherent production in aureomycin, and evidence shows a business decision was made to enter tetracycline field because no *valid* patent would issue; and when sued by Pfizer, countersued, alleging the latter, and then took licenses under the patent; and

Where the two restrictively licensed defendants (Squibb and Upjohn) had been assured they would be the only two bulk customers of Bristol; and each had received assurances from Bristol that its price of bulk to them would soon be equal to one-third of the market price so that they could realize their normal gross margin of 65%, where the then market price was $1000 per kilo (Upjohn's president testified they were discussing market prices); and

Where Squibb and Upjohn had capacity to produce tetracycline in 1955 during course of litigation with Pfizer, but refrained from production in United States; and where Squibb establishes its own manufacturing capacity in South America but refrains from selling its own production in the United States; and where Squibb and Upjohn continue to acquire their tetracycline requirements from Bristol until 1966; and

Where Cyanamid (patent owner of aureomycin) and Pfizer, owner of tetracycline with cross-licenses thereon, repeatedly bring in tandem suits to eject the only competitor-manufacturers from tetracycline market, and Pfizer sues to eject competing sellers from market over thirty times; and establishes unusual customs watches; and

Where all defendants revise their marketing arrangements in tetracycline with the purpose and effect of having tetracycline price identity to all classes of customers; and

Where all defendants either cut off or threaten to cut off drug supplies to price cutting wholesalers and retailers; and

Where pricing information and price lists are exchanged between all defendants; and

Where market prices remained identical or substantially identical; and prices were stable over 13-year period at a level which enabled manufacturers to realize exceptionally high margins of profit;

THE QUESTION IS: UPON SUCH UNDISPUTED FACTS AND EVIDENCE, DO APPLICABLE PRINCIPLES OF ANTITRUST LAW CLEARLY STATED BY THIS COURT IN REPORTED CASES* REQUIRE RESOLUTION OF SUCH FACTS AS THE *PURPOSES OF*, AND *OPERATING PRACTICES* UNDER SUCH SETTLEMENTS, PATENT INTERCHANGE AND LICENSE AGREEMENTS, AND *THE EFFECT THEREOF* ON PRICES?

E. The Required Proof of "Express Agreement" and "Direct Evidence of the Existence of a Conspiracy" Question.

The District Court, in making its findings of fact, explicitly stated:

> . . . the court has deemed it significant that . . (not) a single witness (has appeared) to give any *direct evidence of the existence of a conspiracy* . . . it would seem that at least one disgruntled former employee might have

Standard Oil Co., (Indiana) v. United States, 283 U.S. 163, (1931); *Hartford-Empire v. United States*, 323 U.S. 386, (1945); *United States v. Singer Manufacturing Co.*, 374 U.S. 174, (1963); *United States v. Container Corporation of America*, 393 U.S. 383, (1969). *United States v. Glaxo*, 302 F. Supp. 1 (D.D.C. 1969).

been located who would be willing to come forward and *pinpoint some wrongdoing* on the part of at least one of the defendants. (emphasis added). (384 F. Supp. 265, 276, n. 15, App. C, p. 390a, n. 15)

and as to price fixing, the District Court stated:

. . . in any view of the matter, the parallel pricing actions of Parke, Davis (not a party defendant) and the defendants *must be regarded as strong evidence that no conspiracy existed* (among the defendants) (emphasis added) *(id.* 285, App. C, p. 424a).

and as to an "agreement" to exclude competitors, the District Court stated:

Plaintiff's charge that the defendants engaged in a conspiracy to exclude competitors is not supported by the evidence. As we have seen, there was no such *express agreement* between Pfizer and Cyanamid . . . nor is such inference to be drawn from the fact that the patent interference was settled. (emphasis added) (*id.*, 286, App. C., pp. 429a-430a)*

THE QUESTION IS: IN AN ANTITRUST CASE ACKNOWLEDGED TO BE OF "GREAT PUBLIC IMPORTANCE", IS APPLICATION OF THE PROPER STANDARD OF LAW TO THE FACTUAL AND LEGAL NATURE OF THE TERMS *"AGREEMENT"* AND *"UNDERSTANDING"*, AND THE NATURE OF PROOF, THEREOF, REQUIRED?

F. The "Clearly Erroneous" Question.

The District Court, in its memorandum of decision

*Both courts below curiously cite *Hutzler Bros. Co. v Sales Affiliates, Inc.*, 164 F.2d 260 (4th Cir. 1947) for this proposition. *Hutzler* was a patent infringement action with no antitrust questions involved.

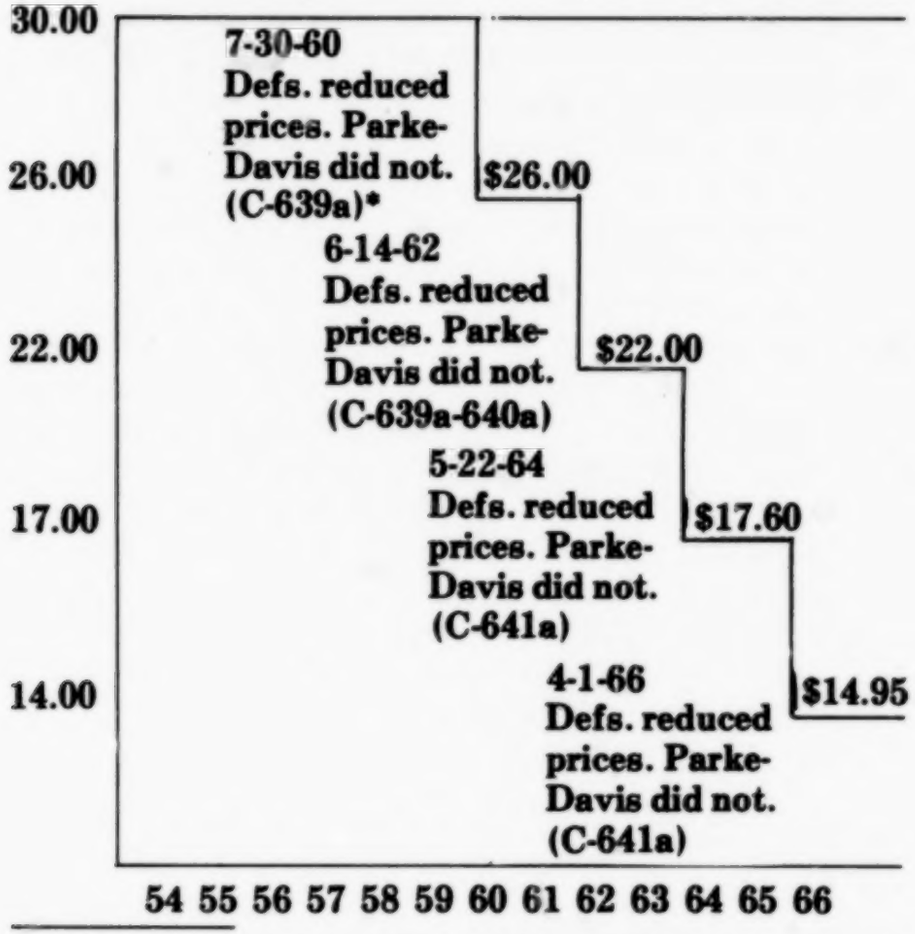
authored by the Court, made certain findings of fact as directed by Rule 52, FRCivP. Additionally, it adopted by reference findings of fact proposed by Petitioner, Pfizer, Cyanamid and Squibb. The net effect of the mixture is that the findings are: internally inconsistent;* essential findings are clearly contradicted by the evidence of record; and other essential findings are barren of evidentiary support.

THE QUESTION IS: SHOULD SUCH FINDINGS BE VACATED AND SET ASIDE AND ESSENTIAL PROPER FINDINGS NECESSARY TO SUPPORT THE JUDGMENT OF THE DISTRICT COURT BE REQUIRED?

*See chart following for graphic illustration of the "parallel pricing actions" of Parke-Davis.

CHART I

The District Court held:
"In any view of the matter, the parallel pricing actions of Parke-Davis and the defendants must be regarded as strong evidence that no conspiracy existed."



*C-639a refers to Appendix C, which contains the court's findings.

IV. STATUTES AND RULES INVOLVED

The following United States Statutes are involved in this case. The full text of each is set forth in a separate Appendix "D".

United States Statutes.

Sherman Antitrust Act, 15 U.S.C. Secs. 1 and 2, Act of July 2, 1890, Chap. 647, 26 Stat. 209, as amended.

Clayton Antitrust Act, 15 U.S.C. Secs. 15, 16(a) and (b) now subsection (i), Act of October 15, 1914, Chap. 323, 38 Stat. 730, as amended.

Rules

Federal Rules of Civil Procedure, Rule 52.

V. STATEMENT OF THE CASE

This is the only consumer class*, treble damage action to reach trial against Respondents alleging violations of Sections 1 and 2 of the Sherman Act.

Petitioner proceeded to trial on a specifically stated theory that the "agreements" and "understandings" upon which it based its action were *partly express* and *partly implied.* (Petitioner's Response filed May 23, 1973 to Respondents' Interrogatory E).

A. Background. In 1953, in contrast to the non-patented "penicillin situation" (characterized by those in the market as a "sick" industry—meaning many producers and sellers, excess production, price "wars", a low and uncertain margin of profit), the broad spectrum antibiotic (BSA) market consisted of only three products, each of which was patented, manufactured and sold to the drug trade exclusively, by its patent owner. Cyanamid had aureomycin, Pfizer had terramycin and Parke, Davis had chloromycetin.

*The class as defined is stated at 384 F. Supp., p. 268, fn. 1, App. C, pp. C-351a-2, 352a). The "Petitioner" here is coextensive with the "Plaintiff" as defined in the trial court's footnote.

This market was characterized by stable and identical prices, exceptionally high margins of profit and non-price competition.

In 1953, the sales of these three products (plus six weeks of tetracycline sales by Cyanamid) exceeded seventy-five million dollars at manufacturer's value* and was distributed as follows (PLX 57)**:

	Dollar Sales	% of the Market
Pfizer	36,665,000	47.3
Cyanamid	34,749,000	44.8
TOTAL (for Pfizer and Cyanamid)	71,414,000	92.1
Parke, Davis	6,159,000	7.9
GRAND TOTAL	77,573,000	100.0

B. Tetracycline Intrudes into BSA Scene. Pfizer's employee, Conover, in June 1952, found that by a simple chemical process he could convert the chemical compound, aureomycin, into a different chemical which later became known as tetracycline. Erroneously believing he had created something new or novel, i.e., tetracycline, he applied for a patent on the product tetracycline and his *chemical process* for its manufacture.

Cyanamid's employees, Booth and Morton, around December 1952, also applied a chemical process to aureomycin and begot tetracycline.*** They, too, applied for a patent covering the "new" product and the *chemical process* for its manufacture.

*Total sales during the thirteen year period, 1954-1966, totaled over one billion six hundred million dollars at manufacturer's value.

**PLX refers to Plaintiff's exhibit.

***The product claims made refer to the chemical compound *per se* in any environment; the claims do not refer to a medicinal product. Thus, the Patent Office assigned these claims to Division 6 (the Chemical Division) and not the Medicines Division.

In 1953, Heyden Chemical Company's Pasquale Minieri (and later in 1953, Bristol's Heinemann and Hooper) developed a *fermentation process* to make tetracycline by directly brewing the product. They, too, applied for patents on the "new" product, and the fermentation process for its manufacture. Prosecution of the applications was the responsibility of the respective companies' top echelon executives, patent attorneys and technical personnel.

Thus, by the end of 1953, the picture presented was:

Company and Employee Name	*Product*	*Process*
1. Pfizer (Conover)	Tetracycline	Chemical conversion of aureomycin
2. Cyanamid (Booth-Morton)	Tetracycline	Chemical conversion of aureomycin
3. Heyden (Minieri)	Tetracycline	Fermentation
4. Bristol (Heinemann-Hooper)	Tetracycline	Fermentation

C. Patent Office Reaction to Tetracycline Patent Applications.

1. *The first interference.* The Patent Office declared an interference between Pfizer's Conover and Cyanamid's Booth-Morton applications on December 23, 1953. This interference was dissolved on February 1, 1954 upon Cyanamid's concession of priority to Pfizer per their November 1953 agreements.

2. *The second interference.* Following the dissolution of the first interference, the Patent Office determined a second interference should be declared between Pfizer's Conover claims and Bristol's Heinemann-Hooper claims, but not Cyanamid's (Heyden) Minieri.

About February 16, 1954 Pfizer and Cyanamid consulted each other about this impending interference involving Pfizer's (Conover) and Bristol's (Heinemann) claims, and discussion was had between them* as to "the best possible approach to the problem . . ." (PLX 122). Subsequently, Cyanamid visited the Patent Office and persuaded it to include Cyanamid's (Heyden) Minieri application in any future interference.

On March 2, 1954, the Patent Office declared the second interference between:

Company and Employee Name	Product	Process
1. Pfizer (Conover)	Tetracycline hydrochloride	Chemical conversion of aureomycin
2. Cyanamid (formerly Heyden's Minieri)	Tetracycline hydrochloride	Fermentation
3. Bristol (Heinemann-Hooper)	Tetracycline Hydrochloride	Fermentation

On October 14, 1954, following numerous motions, the Patent Office, *sua sponte*, dissolved the second interference, stating in its written rejection (PLX 115):

> The interference count is unpatentable over the disclosures of Duggar US 2,482,055,

*Those involved in the discussion were:
F.X. Murphy, Pfizer's in-house patent attorney;
Hutz, Pfizer's outside patent attorney; and
Edelblute, Cyanamid's in-house patent attorney.

Sept. 2, 1952, and the interference is dissolved. It appears from the disclosure of Minieri et al (a party to this interference in an application available to all the parties) that tetracycline is *also* produced in such a fermentation (Duggar or Niedercorn) process and that larger proportions thereof are produced when the amount of chloride in the fermentation medium is low. While neither Duggar or Niedercorn may have realized that tetracycline was in fact produced, they did appreciate, and disclose, that the product was an antibiotic. No invention is involved in the *identification* of the tetracycline and its hydrochloride inherently produced by the reference processes. It has long been held that a purer form of an old product is not inventive and the (apparent) mixture of the prior art meets the count. (citations omitted).

3. **Resumption of *ex parte* prosecution.** Upon resumption of *ex parte* status, the reason for dissolution of the second interference was restated by the Patent Office in the same language quoted above (PLX 118) (i.e., a speculation that inherent prior production of tetracycline in aureomycin produced by the Duggar and Niedercorn processes established that tetracycline was not new or novel within the meaning of the patent statutes) as its reason for rejecting all product claims* in each of the foregoing applications.

a. *Pfizer's Conover Application:* On October 15, 1954, Murphy, Pfizer's patent attorney, directed employees of Pfizer to commence work on aureomycin to determine "the proportion of aureomycin and tetracycline produced in media . . . disclosed in the Duggar

*The *process* claims involved above were not at issue in the trial of this action.

and Niedercorn aureomycin patents", (PLX's 237, 130, 239), and it was clearly in connection with the Conover application. The result of this work was known to Pfizer employees prior to December 8, 1954 and the work revealed tetracycline was present in percentages from less than 5% up to 10%. (PLX 127).

On October 19, 1954, Hutz, Pfizer's outside patent attorney handling Conover, expressed great interest in the results of the experiments in a letter to Murphy. (PLX 160).

However, Bogert testified that Murphy later orally directed him "not to do any more work or make any more entries" in his notebook. (PLX 129, p. 20). Bogert continued the tests but recorded the results outside his regular records. (PLX 127).

Following a November 29, 1954 interview with the Patent Examiner, Hutz drafted and filed a summary of that interview (PLX 118). He stated:

> ". . . even assuming that (Lidoff's) *speculation* as to inherent coproduction was correct . . . " (PLX 118).

there would be no basis in law for the rejection. Lidoff's speculation was that if coproduction occurred in Minieri's tetracycline fermentation process, then it might also have been occurring since 1948 in Cyanamid's aureomycin fermentation process. If so, Lidoff reasoned, tetracycline as a chemical compound would not be new or novel.

The only reference to the importance to Lidoff of a quantity of tetracycline which might be present was Hutz's remark that Lidoff

> . . . is not concerned about *useless trace amounts which cannot be separated from the broths by* methods now recommended for *recovery* of the new antibiotic. (PLX 118, emphasis added) (cf, same quotation in the opinion below, App. A, p. A-25).

The Duggar patent names the "Pidacks" column as a method *to recover* aureomycin antibiotic from the broths. Craig countercurrent distribution, as well as paper chromatography, were methods then recommended and in use to *recover antibiotics from broths.* Prior to December 8, 1954, all three methods above had been used to separate or recover tetracycline in clearly identifiable form from aureomycin broths or products. The proportions invariably varied from 2% to 20%. As Bogert's own notes show, he obtained percentages of less than 5% up to 10% using the Pidacks procedure and paper chromatography. No mention is ever made in the Conover file wrapper or in either of the interference file wrappers of "large", "substantial", "economically feasible recoverable quantities" or any other such definitions. In fact, Hutz testified (Tr. 2939-2940):

> ". . . the dividing line which had been set by Mr. Lidoff was: . . . can you *recover identifiable tetracycline?* If you can, I want to know it, and I would consider that an *appreciable amount,* or a *recoverable* concentration; if you can't, I will accept that it's a *useless trace,* and it doesn't concern me."

In overcoming the Patent Office rejection, Bogert filed an affidavit stating that aureomycin fermentation broths were:

> ". . . tested in a manner that he knows is capable of detecting even a small proportion of tetracycline in chlortetracycline (aureomycin) and showed only (aureomycin)." (PLX 118).

Bogert filed still another affidavit stating he knew of no method whereby

> ". . . any part of the minute amount of tetracycline conceivably present could be separated and recovered in clearly identifiable form." (PLX 118).

Based upon the affidavits, Lidoff allowed the Conover patent on the broad product claims to the tetracycline chemical compound. So advising Pfizer's agent, Pfizer was then permitted to add narrow claims to tetracycline as a medicine, without further review by the Patent Office (Lidoff's relevant testimony regarding the narrow claims is attached as Appendix I).

As to narrow medicine claims first filed with the Patent Office on December 7, 1954, Hutz's remarks state that Lidoff

> . . . doubted that claims 13 to 16 are patentably distinct from claims 1 to 6 (the broad claims to the chemical compound) . . . (PLX 118).

Hutz further noted they took the matter up with Lidoff's superior. Most meaningful to the question of the "quantity 'mutual misunderstanding' " though is Hutz's stated reason for desiring the narrow claims. It is that Pfizer (PLX 118):

> . . . should be granted claims 13 to 16 (15-18) as insurance against some wholly unrecognized prior production of ineffective amounts of the products defined in claims 1 to 6 (the chemical compound), (Cf., E.D.N.C. Findings, App. C, pp. C-533a, 534a).

As late as May 4, 1955 in another patent application (PLX 116), Hutz told the Patent Office:

> It is believed that the Patent Office is now aware of the fact that this 'inherent' production of tetracycline by the Duggar process is not in fact true.

b. *Cyanamid:* The first inquiry as to the coproduction of tetracycline in aureomycin was to Cyanamid's patent attorney Edelblute in November 1953. Edelblute, in December 1953, advised the Patent Office that in manufacturing literally tons of aureomycin there "has not been any" tetracycline produced inadvertently or otherwise. (PLX 111). On December 15, 1953, a Cyanamid patent official wrote (PLX 1010) "if we agree that tetracycline is invariably produced (in aureomycin) obviously this application fails . . ." As of *December 17, 1953,* Malcolm and Edelblute had reviewed the Patent Office inquiry and knew of the "questions of inherent coproduction which the Examiner has raised". (PLX 1009).

Also, in December 1953, a Cyanamid scientist conducted tests on aureomycin and found that tetracycline was present. A memorandum to that effect was sent to Edelblute in February 1954 which shows "Contents Noted HWE"*.

Cyanamid's Edelblute again in June 1954, during the second interference, denied coproduction of tetracycline with aureomycin.

After the allowance of the patent, Edelblute examined the Conover file wrapper and noted:

> "There are, of course, some attorneys who will maintain that the Conover patent is invalid because small amounts of tetracycline *can be proven as pre-existing in the Duggar broth.* They are inclined to adopt the views of the Supreme Court in some of its more vicious attacks upon the patent system . . ."

Cyanamid's outside patent counsel, Watson, responded on January 17, 1955:

> "I remain among the 'some attorneys' referred to in your penultimate paragraph.
>
> The nicety with which the affidavits and

---

*Interestingly, Cyanamid, while before the FTC and the Sixth Circuit, asserted that Edelblute did not receive the memo (401 *F.2d 583) and was apparently based upon his testimony to that effect. (Appendix F, p. F-26).*

arguments were drawn leads me to suspect that the drafters were well aware of the presence of tetracycline in Aureomycin commercially sold over the years. In other words, I am inclined to discount somewhat the professed frankness of the prosecution which preceded the allowance.

It strikes me also that there may be a flaw in your conclusion because I think you overlooked the statutory requirement that the subject matter must be 'new' . . . It is my guess, however, that the issue may never reach the courts for decision."

After the patent issued to Pfizer, and Cyanamid and Pfizer were operating under their patent interchange agreements of November 1953, on May 25, 1955 Edelblute finally advised the Patent Office of the fact of coproduction, stating the fact had been "recently" determined. But, after all, as Edelblute was to later testify:

Without a patent (on tetracycline) every Tom, Dick and Harry with a little bit of money would be in tetracycline . . .

c. *Bristol.* Bristol, on January 5, 1955, too late to stop the Conover patent from being issued, filed an affidavit also admitting coproduction and abandoned its product claims.

Squibb's Langlykke noted the "custom" in the pharmaceutical industry in PLX 178, stating:

In new antibiotic patents in the past it has been the custom to make product and process claims on the basis of a culture of low productivity. The idea being, I suppose, to protect the monopoly even beyond the normal patent term.

D. **Operative Pfizer-Cyanamid Acts and Conduct 1953-1955.**

Pfizer's McKeen testified that (immediately after Cyanamid acquired Heyden's tetracycline patent application on November 1, 1953,) he met twice with Cyanamid's Malcolm and arranged for a settlement agreement between their two tetracycline patent applications, whereby the winner would license the loser and the loser would concede priority in any patent interference. Further, if Pfizer acquired the tetracycline patent (which it did), there would be a patent interchange between it and Cyanamid's extant aureomycin patent. They also agreed for Cyanamid to set Pfizer up in the tetracycline business immediately by selling Pfizer 10,000 kilos of bulk tetracycline at one-third of the prevailing market price. This was accomplished before any declaration of an interference or any exchange of proofs of priority between the parties.

When Schwartz of Bristol attempted to make a similar agreement with Pfizer and Cyanamid for a settlement of any interference between his applicaton and a patent license interchange, both Pfizer and Cyanamid refused.

In January Pfizer's McKeen was quoted in a news article as stating that Pfizer and Cyanamid both expected to take a determined stand against new entrants in the tetracycline field to avoid overproduction. He is further reported to have said that while prices in the BSA market might deteriorate they would never resemble the penicillin price breakdown. Bristol's Schwartz read the article and McKeen confirmed to him that no licenses would be granted to anyone under tetracycline. He further advised he would sue anyone as soon as he had the legal means to do so.

The second patent interference intervened. Proceedings between these three in the second interference have been discussed above.

In September 1954 Bristol (in the tetracycline market since May 1, 1954) made agreements to sell tetracycline in bulk to Squibb and Upjohn. Bristol's evidence shows that Pfizer advised Bristol that the Patent Office route was too slow and that a quicker way had to be found to stop Bristol! Two weeks later Cyanamid sued Bristol to eject them from the tetracycline market using Cyanamid's aureomycin patent as the basis of that litigation.

Pfizer learned on December 9, 1954 that it was to get its patent on tetracycline. Then, about the middle of December 1954 Cyanamid (before any discovery) agreed to settle its lawsuit with Bristol and grant a license to make up to 6% aureomycin in Bristol's tetracycline. Bristol agreed to pay Cyanamid 5% of the sales value of tetracycline for only 6% aureomycin content in the tetracycline.

Cyanamid had licensed Pfizer to manufacture aureomycin at a 2½% royalty rate.

On January 13, 1955 Cyanamid and Bristol memorialized their agreements of mid-December 1954. By then, however, on January 11, 1955, Pfizer had already sued Bristol, Squibb and Upjohn for their alleged infringement of the tetracycline patent.

Bristol's own evidence (DBX 18)* shows that McKeen stated to Bristol:

> . . . I want to make it very clear so there will be no misunderstanding, it is the avowed policy of our company that, dependent upon our legal position, our executive committee and Board of Directors have indicated that if anyone manufactures or sells tetracycline, we will sue. Not just you, but anyone. . . . And the Board has also indicated that there be no licenses given in this country.

**DBX refers to Defendant Bristol's exhibit.*

and McKeen testified:

> "Q. You had already obligated yourself to Lederle (Cyanamid) if you received the patent, to license Lederle? "A. Yes, sir.
>
> "Q. On January 11, 1954? "A. Yes, sir.
>
> "Q. So this statement you made to Mr. Schwartz (on February 16, 1954), then, must have meant, of course, that you were not going to license anyone except Lederle? "A. At that time.
>
> "Q. At that time. Is that correct? "A. That was our present intention at that time."

Bristol, Squibb and Upjohn countersued Pfizer alleging Pfizer obtained the patent on tetracycline by a mistake of fact induced by Pfizer.

After about ten months of discovery, during which most of the material facts relating to the patent issue were uncovered by Bristol, Squibb and Upjohn, Pfizer relented and granted Bristol a license to manufacture and sell tetracycline but restricted Squibb and Upjohn to resell to the drug trade in finished dosage form only, i.e., they could not resell their tetracycline in bulk.

During the period of time 1953-1955 Pfizer and Cyanamid established identical pricing schedules on tetracycline to the entire trade, including identical discounts and handling allowances to wholesalers and retailers, which terms differed from their usual sales to the drug trade.

E. Operative Acts and Practices of Bristol, Squibb and Upjohn 1953-1956.

As soon as Heyden had announced it had tetracycline on October 1, 1953, Upjohn contacted Heyden to get a supply of bulk tetracycline. With the sale of Heyden to Cyanamid this fell through.

Starting in November 1953, Bristol was keeping Squibb and Upjohn informed of tetracycline developments in the Patent Office.

Bristol entered the BSA market May 1, 1954, at identifcal prices to Pfizer and Cyanamid. Bristol advised Pfizer that it wanted two bulk customers and later advised both Squibb and Upjohn of this limit.

In September 1954, Bristol agreed with Squibb and Upjohn to supply their entire requirements of tetracyline. Discussion was had between them as to the cost and market prices. Squibb and Upjohn agreed to indemnify Bristol in the event it suffered damages in any patent infringement litigation. This was the reverse of the usual indemnity agreements.

Squibb and Upjohn entered the BSA market at prices and terms identical to Pfizer, Cyanamid and Bristol in September and November of 1954, which terms differed from their usual sales to the trade.

Bristol, Squibb and Upjohn were well aware of the coproduction issue (tetracycline in aureomycin) in the Patent Office. All knew of the fact of coproduction and all made the decision to enter the tetracycline market on the basis that no valid patent would issue covering the tetracycline product. Bristol and Squibb executed a license whereby Squibb could manufacture tetracyline overseas using Bristol's processes.

Excess production occurred with Bristol as early as January 1955 and Bristol diverted its excess capacity to make such things as Vitalis.

Squibb had capacity to make tetracycline in 1955, and in fact built a plant in Argentina, but instead of selling its own manufactured tetracycline in the United States, continued until 1966 to buy its entire requirements of tetracycline from Bristol.

Upjohn was in a similar situation to Squibb.

A document in evidence shows that after Upjohn won a bid to a hospital by deviation from the list price, Bristol complained (PLX 507), and soon thereafter bids from all three were identical to the third decimal place.

Squibb bid low by a mistaken calculation of 22.04 instead of 22.0402 and its marketing manager wrote that he was disturbed to learn that Squibb had won the bid. (PLX 375).

F. The Pfizer, Bristol, Squibb and Upjohn 1955 Deal.

By the fall of 1955, Pfizer had started having a change of heart about the wisdom of maintaining its action to knock Bristol, Squibb and Upjohn out of the tetracycline market, because of the possible loss of good will with physicians and the doubt as to whether any court would enjoin such a major operation in the first instance.

When Schwartz learned that Bristol's and Squibb's telephone lines had been tapped by a Mr. Broady who was in the employ of Pfizer, Schwartz threatened to inject that fact into the pending litigation and Pfizer immediately settled with all three.

Bristol negotiated the settlement for itself as well as Squibb and Upjohn. Bristol received an "unrestricted" license to manufacture and sell tetracycline while acquiring one to sell to the drug trade only for Squibb and Upjohn. (PLX's 7, 8 and 9).

G. Exchange of Price Information.

Undenied is a record of price information exchanges between Respondents. Some of the evidence is set forth below. Additional evidence is set forth in Appendix J.

Pfizer complained to Cyanamid about its use of "free goods" to a clinic and Cyanamid discontinued the practice (PLX 253).

Cyanamid forwarded its trade classification chart and current price list to Bristol with the assurance that there was no opportunity for deviation (PLX 255).

Bristol "complained" to Upjohn about its bid price to a hospital in Los Angeles (PLX 507).

Cyanamid personnel were directed to "check with Squibb and Upjohn" about a price deviation (PLX 254).

Pfizer sent Upjohn its price schedule and Upjohn reciprocated (PLX's 447, 448).

On May 27, 1954, the Cyanamid Chicago Regional Manager wrote to his Sales Manager:

> Apparently Pfizer and Roerig are *abiding by reduction of samples* because the number of calls from all reports from the field since my return from Absecon, have been practically none. (PLX 560) (emphasis added).

On June 17, 1954, he wrote:

> Within the last thirty days, complaints from the field regarding the Pfizer and Roerig operations have been practically nil. From all indications, it is presumed that these competitors are *adhering to the operation* that was reported by Mr. Wendt at the Regional Managers meeting. (PLX 247) (emphasis added).

H. **Effects On Prices.**

Following are three charts which demonstrate the effects of such contacts which have just been demonstrated:

The first shows those bids to Los Angeles County, a "power" buyer. The second shows those bids to the Veterans Administration.

Professor Markham (Cyanamid's own expert) agreed that such institutions are "power" buyers.

The third shows the price history of tetracycline.

CHART II
BID TABULATIONS TO
Los Angeles County Hospital
After Applying Discount
(Source: Trl. Stip. 3)

Bid Opening Date	Bid No.	C	B	U	P	S	Quantity
2/2/55	4117	22.49		22.04*	22.49	22.49	864
4/6/55	5423	22.49	22.49	22.49	22.04	22.04**	864
7/22/55	6938	22.04	22.04	22.04	22.04	22.04	1200
9/30/55	1592	22.04	22.04	22.04	22.04	22.04	1200
12/18/55	2552	22.04	22.04	22.04	22.04	22.04	1200
4/11/56	5214	22.04	22.04	22.04	22.04	22.04	1800
6/25/56	6902	22.04	22.04	22.04	22.04	22.04	1800

CHART III
BID TABULATIONS TO
Veterans Administration
(Source Trl. Stip. 4)

EFFECTIVE PRICE OF DEFENDANTS' BIDS TO MILITARY MARKET
250 mg. X 100

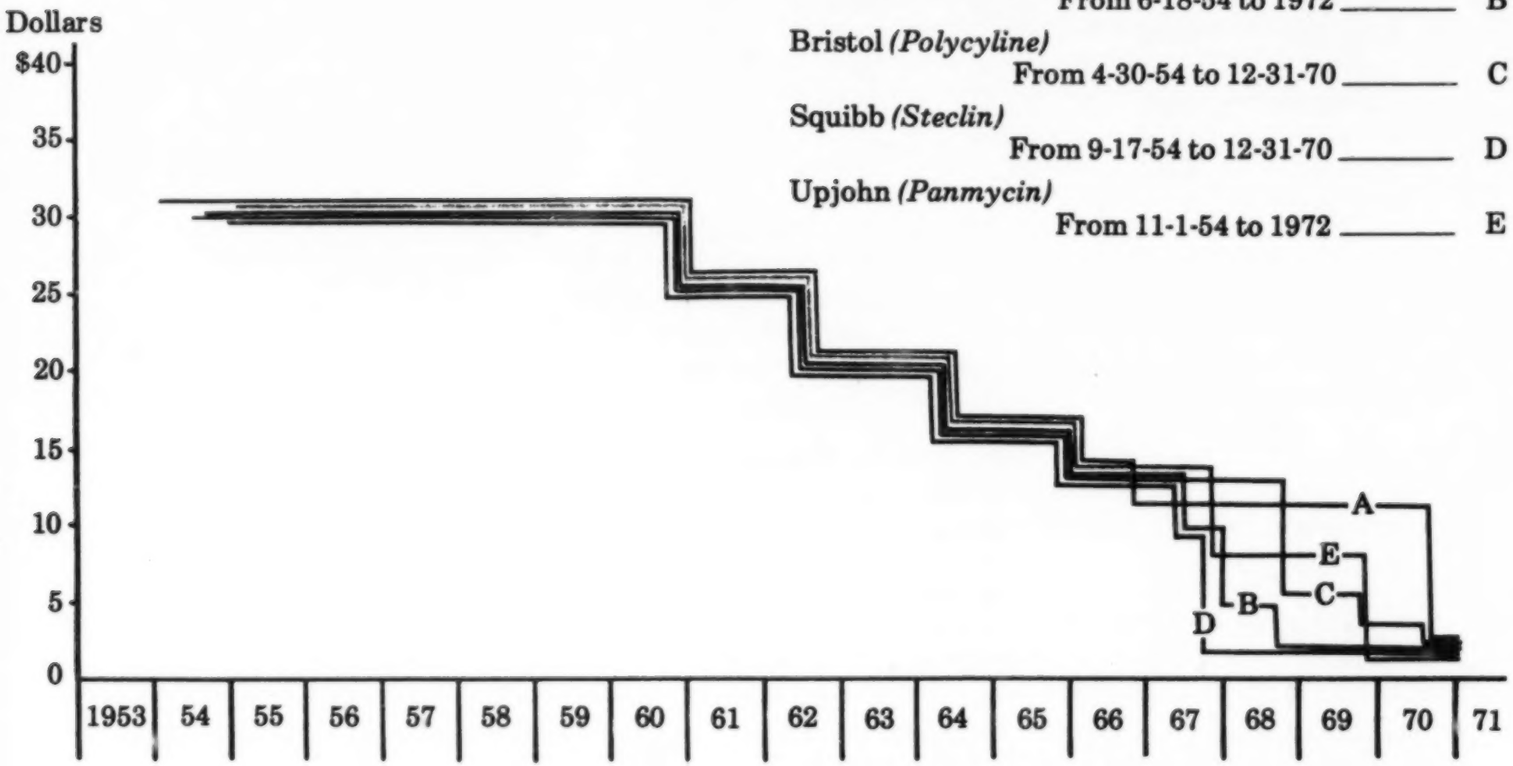
Date	Agency	Pfizer	Cyanamid	Bristol	Squibb	Upjohn
6/6/55	VA	19.188	19.188	19.188	19.188	19.188
6/10/55	VA	19.188	19.188	19.188	19.188	19.188
6/27/55	VA	19.188	19.188	19.188	19.188	19.188
12/7/55	VA	19.188	19.188	19.188	19.188	19.188
6/21/56	VA	19.188	19.188	19.188	19.188	19.188
7/30/56	VA	19.188	19.188	19.188	19.188	19.188

Regarding such price identity, Markham testified:

> What I had in mind was the old cement institute case where larger customers put out for bids, and as I recall, about eight or ten cement manufacturers submitted bids to the sixth decimal place on very large orders of cement . . . I only have to repeat what one mathematician said about it. "The chances of that happening by just random events rather than by their having gotten together is about one over ten to the tenth power" which makes it very unlikely.

***won by Upjohn - cross reference PLX 507 (Appendix J, p. J-2).**
****won by Squibb - cross reference PLX 375 (Appendix J, p. J-2).**

TETRACYCLINE PRICE HISTORY
1953-1970
(Source: Trial Stipulation One)



Price to Retailers
250 mg. - (Bottle of 100)

Cyanamid *(Achromycin and Achromycin V)*
From 1-11-54 to 1972 _____ A

Pfizer *(Tetracyn)*
From 6-18-54 to 1972 _____ B

Bristol *(Polycycline)*
From 4-30-54 to 12-31-70 _____ C

Squibb *(Steclin)*
From 9-17-54 to 12-31-70 _____ D

Upjohn *(Panmycin)*
From 11-1-54 to 1972 _____ E

I. Post 1955 Developments.

Pfizer instituted customs watches under its Conover Patent to detect any imported tetracycline and instituted some 36 lawsuits to restrain trade in tetracycline.

On July 28, 1958, the F.T.C. issued its complaint against all five defendants. (63 F.T.C. 1747).

In 1960, the U.S. Senate subcommittee on Antitrust (the "Kefauver" hearings) held hearings on administered prices in the drug industry which drew considerable adverse public reaction against the drug industry.

Then, between 1962 and 1964 some foreign manufactured tetracycline commenced being sold generically in the United States.

In 1962 a new American producer of tetracycline entered the market, International Rectifier. Rectifier was immediately sued by Pfizer and when a settlement was reached between Pfizer and Rectifier, Cyanamid sued under a different patent.

On December 17, 1963 the F.T.C. entered its decision adverse to the five Respondents (63 F.T.C. 1747) and entered its order accordingly at 63 F.T.C. 1908-1912.

All five Respondents appealed and two of the grounds, among others, were: (1) the F.T.C. did not have jurisdiction over the patent; and (2) the patent examiner Lidoff should have been made available for examination (363 F.2d 757, 768, 779, 6th Cir. 1966).

A specific ground of appeal was the lack of fairness by the F.T.C. due to its chairman's participation in the adjudication. The Sixth Circuit then removed him from the case on its retrial. No further allegations of F.T.C. unfairness were made by Pfizer or Cyanamid in that litigation. (See Appendix E, pp. E1-E8).

On August 1, 1964, McKesson-Robbins announced it was entering the tetracycline market with its own

brand of tetracycline at one-third of the prevailing market price. (PLX 985).

Cyanamid immediately terminated its wholesaler agreements with McKesson-Robbins and Pfizer sued McKesson (See *McKesson-Robbins, Inc. v. Charles Pfizer and Co.* and *American Cyanamid Co.*, 235 F. Supp. 743 E.D. Pa. 1964).

On November 4, 1964, McKesson was successful in enjoining *pendente lite* Cyanamid from terminating its wholesaler agreement, 235 F. Supp. 743 (E.D. Pa. 1964).

On June 16, 1966, the Sixth Circuit entered its decision on Appeal of the F.T.C. trial, remanding to the Commission the case for further proceedings. It held, *inter alia:* (1) the Commission had jurisdiction; and (2) it agreed that Pfizer's contention was correct, that without Lidoff's testimony the F.T.C.'s decision on the patent issue was not supported by substantial evidence, and it directed that Lidoff appear as a witness. (363 F.2d 757, 711, 779).

By the end of 1966, the tetracycline market was open and the resulting competition had the effect on prices as shown on Chart IV, *supra* p. 32.

VI. REASONS FOR GRANTING THE WRIT

A. A Clear Conflict Exists Between the Circuits.

At issue in this case is the fraudulent procurement of the Conover patent which has formed the basis of a billion dollar industry. The issue of fraud in this case was finally decided by the Sixth Circuit in *Chas. Pfizer & Co. v. F.T.C.*, 401 F. 2d 574 (6th Cir. 1968), *cert. denied,* 394 U.S. 920 (1968). It is also the same issue which the Eighth Circuit addressed in the instant litigation during multidistrict proceedings, *Pfizer v. Lord,* 456 F.2d 545 (8th Cir. 1972). The evidence in all cases has been the same and the conclusions made with regard to that evidence consistent until the question reached the District Court (E.D.N.C.) and the Fourth Circuit.

The District Court *held* (affirmed by the Fourth Circuit):

> ". . . at best, the evidence has left the court with the impression that there was a mutual misunderstanding between Lidoff and Pfizer's representatives as to what Lidoff wanted established . . ."
>
> ". . . the evidence, regardless of how the words used by the parties are to be interpreted, falls short of establishing fraud . . ."
>
> 384 F. Supp. 265, 281, App. C., p. C-409a).

contrasted to the FTC finding affirmed by the Sixth Circuit:

> ". . . the evidence is clear and convincing that Pfizer committed fraud upon the Patent Office in procuring its patent."
>
> ". . . the evidence is clear and convincing that Cyanamid deliberately withheld from the Patent Office information which it knew or had reason to believe was relevant to the validity of Pfizer's application for a patent on tetracycline."
>
> * * * *
>
> ". . . the Patent Office records were sufficient to put both Pfizer's and Cyanamid's representatives on notice that Lidoff was interested in ascertaining whether any tetracycline was inherently produced in aureomycin broths . . ." 401 F. 2d at 585.

It is clear the decision below is in direct conflict with the Sixth Circuit on an issue of great national importance. It is further evident that this conflict involves a question pertaining to litigation still in progress, which trial commenced December 1974

(*U.S. v. Pfizer et al*, Dkt. 4-71 Civ. 403, D. Minn), with more forthcoming, as a number of foreign governments have been granted standing to sue these Respondents in the Eighth Circuit *(Pfizer v. Lord*, 522 F. 2d 612 (8th Cir. 1975).

B. **The Collateral Estoppel Issue.**

The plea of estoppel (fact preclusion) by Petitioner was directed to a fact as one element of a claim under the Sherman Act, and not *res judicata* (claim preclusion) to which Sec. 5(a) of the Clayton Act refers.

It is clear from the Court's Opinion below that it deemed estoppel is not barred as a matter of law from being asserted offensively and as to an administrative agency decision, (Op. pp. 18, 19, App. A., p. A-20, 21) as did the District Court, (see Appendix B, pp. B-11).

Nevertheless, the Court below denied estoppel, holding that Pfizer and Cyanamid were not provided a fair opportunity "procedurally, substantively and evidentally" to litigate the issue (of fraud).

The criteria for determining that question are set forth by this Court in *Blonder-Tongue** as:

> Did the party against whom the plea is asserted have a procedurally fair and full opportunity to litigate and fail in that effort? (Id., at 325, 332)
>
> Did they have an opportunity and incentive to contest the issue there? (Id., at 325)
>
> Was substantial justice achieved in the prior determination? (Id., at 325)
>
> Was the patentee prepared to litigate and did he litigate to the finish on his patent? (Id., at 332)

The proceedings of a Federal Trade Commission adjudication meet the requirements of constitutional

**Blonder-Tongue Lab., Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971).

due process (see e.g. *Bendix Corp. v. FTC*, 450 F. 2d 534, 6th Cir. 1971). It is patent from the history of the FTC litigation that the answer to the other criteria is affirmative.

Blonder-Tongue requires inquiry and determination of the foregoing elements by examination into the prior adjudication by the District Court when estoppel is asserted. The Court below, without resolving those elements, has decided *as a matter of law* that the Federal Trade Commission, acting pursuant to specific directions of a United States Court of Appeals, did not provide these Respondents with a fair hearing.

The basis of the opinion below is demonstrably contrary to fact. For example, as to procedural and substantive fairness: a complaint was issued making specific allegations as to Pfizer's and Cyanamid's fraud (*In re: American Cyanamid*, 63 F.T.C. 1747, 1752, 1754 (1963) which are clearly sufficient to meet the specificity required by Rule 9, F.R.Civ. P. A hearing was held in which the FTC counsel supporting the complaint had the burden of proof, (16 CFR Sec. 3.43) and the evidentiary standard followed throughout the hearing on remand was "clear, convincing and substantial" evidence. *(In re: Cyanamid*, 72 F.T.C. 623, 633, 685, 687 (1967). The issue was fraud. Pfizer's and Cyanamid's briefs explicitly state they knew the issue involved fraud (e.g., see Appendix E, pp. E-9-14).

Opportunity to be present at the hearings, to participate in the trial, to cross examine, to offer witnesses, to contradict, rebut and explain evidence was afforded at every opportunity. (16 CFR Sec. 3.41(c)). Decision was had upon all the evidence by an impartial fact-finding body of the United States with jurisdiction to adjudicate the facts. *(Cyanamid v. F.T.C.*, 363 F.2d 757, 771 (1966). Even any appearance of bias in the adjudication was removed by action of the Court of Appeals in removing FTC Chairman Dixon from any participation in the case on remand.* Contrary to the

***See Appendix E, pp. E-3 thru E-5 which contains excerpts from Respondents' brief to recuse Dixon.*

clearly wrong opinion of the Court below, findings on every element of fraud and the ultimate finding of fraud was made upon "clear and convincing" evidence.

The evidentiary standard governing admissibility of evidence followed by the Hearing Examiner was explicitly stated to be the "Proposed Model Rules of Evidence" for the United States District Courts, which rules have since been adopted.

The wisdom of this Court's requiring trial court inquiry and determination of the listed factors in *Blonder-Tongue* where estoppel is asserted is amply demonstrated by the action below.

Simply put, the Court below was not familiar with the prior proceedings in the FTC adjudication or the four years of coordinated pretrial proceedings in this case.

Furthermore, citing *U.S. v. Pfizer*, 205 F. Supp. 94, 96 (S.D.N.Y. 1962), the Court below seems to disparage this Court's rule as enunciated in *F.T.C. v Cement Institute, et. al.*, 333 U.S. 683, 694 (1948), in which it was *held!*

> . . . Just as the Sherman Act itself permits the Attorney General to bring simultaneous civil and criminal suits against a defendant based on the same misconduct, so the Sherman Act and the Trade Commission Act provide the Government with cumulative remedies against activity detrimental to competition . . ."

The court below concluded that it would be "strangely unfair" to permit a private litigant "not even a party" to the prior litigation to assert an estoppel against a losing party in a prior government action. The paradox of this view is that the Court below in *Technograph** permitted assertion of estoppel where the fact previously litigated was in a private action.

**Technograph Printed Circuits, Ltd. v. Martin-Marietta Corp.*, 474 F.2d 798 (4th Cir. 1973).

The inexorable logic of the Court below then is, if the fact was previously finally adjudicated in an action instituted by the United States or its agencies, estoppel is not available, but where it was adjudicated in an action instituted by a private litigant, it is. Neither *Cement Institute* nor *Blonder-Tongue* require such a result.

Perfect symmetry for its own sake is no reason to permit constant relitigation of the same factual issue once finally and fairly decided.

Reference by the Court below to Section 5(a) of the Clayton Act as a reason to deny fact estoppel is even more bewildering, considering the fact that in this very case it was *held:* Section 5(a) Clayton has no application to a Section 5 FTC proceeding *because of limiting specific congressional language in the statute.* No such limitations apply in the general law of estoppel, and the District Court (D. Minn) specifically noted assertion of collateral estoppel was not precluded by either its decision or Section 5(a) Clayton, (App. A, p. A-23; cf. App. B, pp. B-28-9).

Thus, the Court below, while disregarding the law of the case, holds that Section 5(a) Clayton precludes assertion of estoppel in a case in which it was *held:* Section 5(a) Clayton does not apply!

C. **Mens Rea was Required as Element of Fraud.**

The District Court (E.D.N.C.) required proof of a *mens rea*, i.e., a specific intent to defraud as an element of charges of fraud on the Patent Office.

To be sure, where fraud is charged in a criminal action, specific intent is an element to be proven.

But this is a civil action sounding in tort. In such a case, Justice Ervin (later Sen. N.C.) stated in *Cofield v. Griffin*, 238 N.C. 377, 379, 78 S.E. 2d 131, 133, (1953):

> The essential elements of fraud are these: (1) that defendant made a representation relat-

ing to some material past or existing fact; (2) that the representation was false; (3) that when he made it, defendant knew that the representation was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that defendant made the representation with intention that it should be acted upon by plaintiff; (5) that plaintiff reasonably relied upon the presentation, and acted upon it; and (6) that plaintiff thereby suffered injury. *Parker v. White,* 235 N.C. 680, 71 S.E. 2d 122; *Foster v. Snead,* 235 N.C. 338, 69 S.E. 2d 604; *Vail v Vail,* 233 N.C. 109, 63 S.E. 2d 202. A false representation is material when it deceives a person and induces him to act. *Starnes v. R.R.,* 170 N.C. 222, 87 S.E. 43; *Machine Co. v. Bullock,* 161 N.C. 1, 76 S.E. 634 . . . "We are not inclined to encourage falsehood and dishonesty, by protecting one who is guilty of such fraud, on the ground that his victim had faith in his word, and for that reason did not pursue inquiries which would have disclosed the falsehood." (at 381-382)

Petitioner does not suggest the Court give an all embracing definition of fraud, lest crafty men design ways around it. But we do contend sufficient definition and delineation are necessary to enable victims of patent fraud to meet the pleading requirements of Rule 9, F.R.Civ.P., essential findings required by Rule 52 (or 49 in a jury trial) and to relate proof to pleadings so that the antitrust laws may have their full play in such cases.

We note that where the issue of fraud in the context of the *Walker Process* case is asserted in antitrust claims a *mens rea* or its equivalent in other language, is increasingly being accepted by the lower courts. Appendix G sets forth a list of the antitrust cases including patent fraud decided since this Court's decision in *Walker.* It is noted that, with a single exception where specific findings were not entered, not a single case has been made out. Varying rationals used in the cases are nebulous.

Petitioner submits the reason for the apparent emasculation of this Courts' rule is the lower courts' interpretation of the terms used in *Walker* relating to "knowing" and "willful" in juxtaposition to "technical fraud".

Examination of the cases using the term "technical fraud" reveals the term does not relate to the concept of fraud at all but to the invalidity or unenforceability of a patent *per se.* The cases all arise out of infringement actions.

The concept of fraud spoken of in *Walker* is the *tort of fraud, vis a vis,* the crime, and the terms "knowing" and "willful" relate to the concept of *scienter,* not *mens rea.*

Petitioner suggests to this Court that to carry out the purposes of the *Walker Process* doctrine, it is necessary to define the "knowing" as relating to knowledge (or reasonable notice) of *materiality* and knowledge that the representations are false or made with a reckless disregard as to the truth of falsity thereof; and the "willful" as that the party intends for the Patent Office to rely upon the statements made.

We further suggest that such definition and delineation will serve to aid the United States Courts and victims of such fraud to bring to the bar of justice those who would seek to enrich themselves by craft and "nicety" of language while failing to fulfill their uncompromising duty to the patent office, *Precision Instrument Mfg. Co. v Automotive Maintenance Machinery Co.,* 324 U.S. 806 (1945).

If Petitioner's contentions are correct, then in this case, because all other elements of fraud are clearly and undisputably proven, the crucial question on the

issue of fraud is the sufficiency of the written Patent Office records to put Pfizer's and Cyanamid's patent agents on notice that Lidoff considered any inherent production of tetracycline in aureomycin prior to June 1952 to be material in his consideration of the novelty of the chemical compound—tetracycline.

If the Sixth Circuit's decision is binding upon Respondents and the courts, that

> Patent office records were sufficient to put both Pfizer's and Cyanamid's representatives on notice that Lidoff was interested in ascertaining whether any tetracycline was inherently produced in aureomycin broths, and not ten per cent or other "appreciable" or "recoverable" amounts as now contended. (at 585). 401 F.2d at 585.

then that should terminate for all time that phase of this, and pending, litigation because, as was correctly understood by the Sixth Circuit and misunderstood by the Fourth:

> "Lidoff was still groping for information. Pfizer had already established coproduction as a *fact* while to Lidoff this remained a matter of speculation . . . Convinced by Pfizer's representative that tetracycline was *not* inherently coproduced in manufacturing aureomycin, Lidoff changed his decision and granted the patent (401 F.2d 582, 6th Cir. 1968).

D. The Failure to Find Essential Facts Which Relate to Respondents' Purposes and Operating Practices and Effects Thereof on Prices.

The District Court must resolve with findings of fact, the contested issues relating to the *purposes* of defendants in privately settled patent interferences, patent infringement litigation, issuance of cross-

licenses under patents which effectively controlled over 92% of the products in the relevant market, the *restrictive operating practices* of defendants under the patents and licenses, (including exchange of price information) and the effect, if any, of such restrictive licensing and other arrangements and practices on the products in suit. These principles are set forth in the following cases: *Standard Oil Co., (Indiana) v. United States,* 283 U.S. 163 (1931); *Hartford-Empire v. United States,* 323 U.S. 386, (1945); *United States v. Singer Manufacturing Co.,* 374 U.S. 174, (1963); *United States v. Container Corporation of America,* 393 U.S. 383 (1969); *United States v. Glaxo,* 302 F. Supp. (D.D.C. 1969).

This the District Court failed to do, and the Court below, in its opinion, totally ignored the necessity of such findings in this case and their absence. If the Court below was of the opinion that such findings are not essential to a proper disposition of this case according to settled law, it was not voiced in its opinion (nor in the District Court's) what controlling features in this case take it outside the ambit of *Standard Oil of Ind., Hartford-Empire, Singer, Container Corporation,* and *Glaxo, id.*

In the *Standard Oil* case, 283 U.S. at 169, this Court said as to patent interchanges, these

> . . . arrangements may obviously result in restricting competition . . . The limited monopolies granted to patent owners do not exempt them from the . . . Sherman Act . . . Hence the necessary effect of patent interchange agreements, and the operations under them must be carefully examined in order to determine whether violations of the (Sherman) Act result . . .

In *Hartford-Empire, supra.,* the Court found violations of the Sherman Act, where defendants, through patent ownership and licensing controlled over 90% of

the market in glass-making machinery. The evidence there demonstrated the *operating practices were restrictive licensing explicitly stated* with the effect that competition was curtailed and prices were controlled. The Courts found defendants' purposes were restriction or lessening of competition and price control.

In the *Singer* case, Singer had settled a patent interference to enable the patent applicant to obtain broad claims to sewing machine parts. The District Court dismissed the government's action under the Sherman Act and, on appeal, the Supreme Court reversed on the basis that the purpose of the settlement was to restrain competition through acquisition of the broadest patent claims possible in this case. In his concurring opinion in *Singer,* at pp. 199-200, Mr. Justice White said:

> "* * * There is a public interest here * * * which the parties have subordinated to their private ends—the public interest in granting patent monopolies only when the progress of the useful arts and of science will be furthered b cause as the consideration for its grant the public is given a novel and useful invention. * * * When there is no novelty and the public parts with the monopoly grant for no return, the public has been imposed upon and the patent clause subverted. * * * Clearly collusion among applicants to prevent prior art from coming to or being drawn to the Office's attention is an inequitable imposition on the Office and on the public. * * * In my view, such collusion to secure a monopoly grant runs afoul of the Sherman Act's prohibitions against conspiracies in restraint of trade—if not bad *per se,* then such agreements are at least presumptively bad."

In *Container,* this Court held that where exchange of price lists between competitors had the effect of stabilizing prices, Sec. 1 of the Sherman Act was violated.

The cases then turn upon the facts relating to purpose, operating practices and effect on prices or competition. These facts have not been decided in this case.

The failure of the District Court to determine those facts was called to the Fourth Circuit Court's attention by Petitioner in its appeal, and these points were not addressed by that Court in its opinion.

E. The Evidentiary Standard Applied by the District Court.

The evidentiary standard applied by the District Court is clear. It required an "express agreement" to exclude competitors. With the circumstances involved in this case it found "no competent evidence of any agreement or understanding against licensing others" (Finding No. 45). The District Court "deem(ed) it significant that (petitioner had) failed to produce a single witness to give any direct evidence of the existence of a conspiracy" (App. C, 390a) or "secret agreements" (App. C, 416a). The Court below in affirming the District Court, has again put its imprimatur upon that erroneous standard.

In *United States v. Parke-Davis,* 362 U.S. 29, 52 (1960), Justice Harlan observed:

> . . . Until today I had not supposed that any informed antitrust practitioner or judge would (not) know that the concerted action proscribed by the Sherman Act need not amount to a contractual agreement.

and Justice Brennan noted in *Parke-Davis, id.,* p. 44 that this Court had previously had to reverse the Fourth Circuit in *Frey & Son, Inc. v. Cudahy,* 256 U.S. 208, because it erred in concluding " 'there was no for-

mal written or oral agreement . . .', hence no violation of the Sherman Act."

The Court in *Parke-Davis* noted the proper standard to be used. Justice Brennan said in 362 U.S. at 44:

> . . . Judicial inquiry is not to stop with a search of the record for evidence of purely contractual arrangements. The Sherman Act forbids combinations of traders to suppress competition . . . Thus, whether an unlawful combination or conspiracy is proved is to be judged by what the parties actually did, rather than the words they used . . . Because of the nature of the District Court's error we are reviewing a question of law (and not Rule 52—clearly erroneous matters).

Apparently the Court below failed to catch the distinction. It said in its opinion two questions were presented in this appeal: Collateral estoppel and clearly erroneous matters, even though the questions stated on appeal clearly raised the question of standards and the assignments of error were carried forward and briefed on appeal. (See Appendix H, pp. H-1 thru H-11).

F. To Vacate and Set Aside Findings Which are Clearly Erroneous.

The District Court, in dismissing Petitioner's action, authored a memorandum of decision and adopted 456 findings propounded by Respondents. In doing so, the District Court has adopted findings which can be shown to be internally inconsistent, contrary to the evidence and others not supported by any evidence of record whatsoever. (e.g. See Chart I, *supra.*, p. 14 for illustration).

That such findings are clearly erroneous within the meaning of Rule 52, F.R.Civ.P. is well established. *(United States v. Singer Manufacturing Co.*, 374 U.S. 174 (1963).

The main premises of the District Court's decision are contradicted by its own findings. Whether adopted or made by the Court itself is immaterial. The result is they are not adequate to furnish an understanding of the basis or premises upon which the case was decided, and cannot support the judgment entered.

The scope of the Rule 52(a) requirement that, in nonjury cases, ". . . the court shall find the facts specially and state separately its conclusions of law thereon . . ." has been clearly established by the decided cases. *Carr. v. Yokohama Specie Bank, Limited,* 200 F.2d 251, 255 (9th Cir. 1952), states the requirements

> ". . . While the federal rule relating to findings of a trial court does not require the court to make findings on all facts presented or to make detailed evidentiary findings; if the findings are sufficient to suppport the ultimate conclusion of the court they are sufficient. * * * The ultimate test as to the adequacy of findings will always be whether they are sufficiently comprehensive and pertinent to the issues to provide a basis for deci-

sion and whether they are supported by the evidence." 301 F.2d at 75

The purpose of the requirement that findings of fact be made was stated by the Fifth Circuit in *Gulf King Shrimp Co. v. Wirtz*, 407 F.2d 508 (1969), as follows:

> "The purpose of F.R. Civ. P. 52 is to afford the appellate court a clear understanding of the basis of the trial court's decision." (citing *Featherstone v. Barash*, 345 F.2d 246 (10th Cir. 1965) 407 F.2d at 515.

Such has not been done in this case as a review of the Fourth Circuit's opinion so painfully illustrates.

The District Court acknowledged that inferences favorable to plaintiff exist, but then, explains that petitioner has not carried its burden of proof. Without reference to a single exhibit or the evidence of meetings where prices were explicitly or implicitly discussed, the District Court sweeps such evidence from view in a "concession to the shortness of life."

CONCLUSION

Underlying each facet of this petition is a national antitrust policy question of utmost importance which compels review of this case. This litigation epitomizes the plight of the private antitrust litigant in a complex major antitrust action. As it is the policy in this country to encourage private antitrust enforcement, has that policy been subverted when, after surviving monumental pretrial delays and discovery, plaintiff is denied collateral estoppel of a prior FTC adjudication, is required to prove fraud on the Patent Office under a criminal standard of *mens rea*, is required to prove express agreements, is required to prove conspiracy by direct evidence and its repeatedly asserted allegations of violations per *Hartford-Empire, Container, Singer, Glaxo*, and *Standard Oil of Indiana*, are totally ignored by the District and Circuit Courts?

If the answer is yes, and Petitioner says it is, then Petitioner has been denied *justice according to law.* The sole beneficiaries of this injustice are Respondents, two of whom have been adjudicated to have defrauded the United States Patent Office, and all of whom will be permitted to retain literally tens of millions of dollars in illicit profits taken from the people of this state.

For the foregoing reasons, Petitioner respectfully prays Writ of Certiorari be issued to the Fourth Circuit Court of Appeals in this case.

Respectfully submitted.

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Dated: June 11, 1976

CERTIFICATE OF SERVICE

The undersigned, Jean A. Benoy, hereby certifies: that he is a Deputy Attorney General of North Carolina, licensed to practice law in the Supreme Court of North Carolina and in the United States Supreme Court.

That on June 11, 1976 he served all parties required to be served, by depositing three (3) copies of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit, in a United States Post Office, with Air Mail postage prepaid, properly addressed to Counsel of Record for the respective parties at their post office addresses as follows:

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